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INITIATING THE ADMINISTRATIVE RULE MAKING PROCESS IN WISCONSIN: THE CONSERVATION COMMISSION

DONALD E. BOLES*

One may learn a great deal about the democratic aspects of an administrative agency's processes by studying the manner in which its administrative rules are initiated. Most administrative procedure acts contemplate a certain amount of public participation in this stage of the rule making process. It should be recognized, however, that real dangers can arise from an over-extension of public activity in this area. The possibility always exists that various well-organized interest groups may become so obstructive that dynamic action by the agency in meeting contemporary problems is made relatively impossible. The agency itself clearly must have sufficient authority to initiate rules on its own motion to meet the problems that its fact-finding personnel or technical staff have pointed up. The problem then is to strike a balance which permits public participation at this point in the administrative process but which also permits the agency to operate effectively.

While the agency and the private groups or associations which it regulates are probably responsible for initiating the majority of administrative rules, a variety of other sources play a part in this stage of the rule making process.¹

GENERAL SOURCES OF RULES IN WISCONSIN²

The study of rule making in Wisconsin by the Wisconsin Legislative Council's Committee on Administrative Rule Making reveals that the origin of practically all rules of Wisconsin state agencies can be

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¹ For a general discussion of the role of the public in initiating the rule making process see for example: A. Leirson, *Administrative Regulation*, Chicago, 1942; J. R. Pennock, *Administration and the Rule of Law*, New York, 1941, Ch. 2; J. Hart, in President's Commission on Administrative Management, *The Exercise of Rule Making Power*, "Special Study" No. 5, Washington, 1937; R. F. Fuchs, *Rule Making and Contested Cases*, 33 *IA. L. Rev.* 210 (1948); J. Landis, *The Administrative Process*, New Haven, 1938, pp. 62-76.

² Much of the information relating to the rule making process of the Wisconsin Conservation Commission has been obtained from interviews with Mr. Emil Kaminiski, attorney for the department, Mr. Walter Scott, Administrative Assistant to the Conservation Director, and a number of other department representatives. The major sources for rule making procedures of other Wisconsin agencies are the exhaustive studies by the Wisconsin Legislative Council Committee on Administrative Rule Making which will be referred to from time to time throughout this study.

traced to one or more of several sources.³ These are: legislative action, administrative experience, the federal government, associations of government officials, private interest groups and miscellaneous sources such as private individuals, court decisions, attorney general's actions and advisory committees.

Legislative action normally initiates rule making either by a grant of power directing or authorizing an agency to adopt rules by legislation which supercedes or alters rules already in effect.⁴ Rules resulting from administrative experience of the agency in administering the law are numerous and most frequently take the form of interpretative rules,⁵ relating to the agency's enforcement and licensing policies.⁶ The role of the federal government in rule making actions of Wisconsin agencies comes about primarily because of the various grant-in-aid programs,⁷ and the federal government plays a part in the rule making by the Conservation Commission. There are a variety of associations of government officials, normally with a nation-wide membership, which meet annually to study common problems with an eye to improving government efficiency and promoting uniformity. While there is little direct evidence that such organizations have had an influence on conservation rule making, the Legislative Council Committee on Administrative Rule Making believed that they had significant influence on other fields and went so far as to list some of the more influential of these associations.⁸

Private interest groups are responsible for initiating a large amount of rule making. Generally their activity takes the form of complaints or recommendations from the regulated industry or groups affected by the rules of an agency. The rule making committee found, after its field study indicated the multiplicity of groups operating in this area, that it was conclusively revealed that pressure group influences were not restricted to the legislative process as distinguished from the ad-

³ See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, Dec. 1954, pp. 23-33.

⁴ One difficulty the Legislative Council's Committee on Administrative Rule Making discovered regarding legislative grants of rule making authority was that agencies frequently overlooked the distinction between mandatory and permissive grants of authority. See: *Ibid.*, p. 24.

⁵ For a discussion of interpretative rules in general see: K. C. Davis, *Administrative Law*, St. Paul, 1951, pp. 194-211.

⁶ Many rules of the Conservation Commission are initiated by conservation department personnel charged with the responsibility of administering commission policy. Most proposals for rules aimed at establishing fish and game refuges originate within the department following studies of spawning and habitat conditions.

⁷ For examples of federal government influences in areas other than the field of grants-in-aids see: WISCONSIN LEGISLATIVE COUNCIL, 1955, Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, Dec. 1954, p. 27. See also: Conservation Commission Minutes, July 16, 1953, p. 22.

⁸ WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, Dec. 1954, pp. 28-29.

ministrative rule making process.⁹ The final source of rules is a miscellaneous assortment of elements ranging from private individuals to court decisions and actions by the attorney general. It was the view of the Committee on Administrative Rule Making that these sources, on the whole, were of less importance in initiating the rule making process in Wisconsin than were the sources previously mentioned.¹⁰

GENERAL PROCEDURES FOR INITIATING RULES

While the procedures utilized in initiating rule making may be either formal or informal, Wisconsin practice generally tends to favor informal procedures.¹¹ One section of the original Wisconsin ADMINISTRATIVE PROCEDURE ACT, however, specifically provided for formal procedures in initiating rule making.¹²

"Any interested person may petition an agency requesting the promulgation or amendment or repeal of any rule. Each agency shall prescribe by rule the form, content, and procedure for submission, consideration, and disposition of such petitions."

Field studies by the Legislative Council's Committee on Administrative Rule Making, however, revealed that only 4 of the 46 Wisconsin agencies included in the study stated that they had received formal petitions for adoption, amendment or repeal of rules.¹³ Of these four agencies only two—the Public Service Commission and the Board of Health—have adopted rules for the submittal of such petitions,¹⁴ as prescribed by the above section of the Wisconsin Statutes.¹⁵ Because of the general failure on the part of most agencies to prescribe formal procedures of submission and disposition as outlined in the above section, the Administrative Rule Making Committee recommended that such procedures be specifically written into the statutes.¹⁶ This

⁹ *Ibid.*, p. 29.

¹⁰ *Ibid.*, pp. 31-33. Another point that might be included here is that economic or technological changes at times clearly dictate to all concerned the need for changes in rules. For a discussion of this point in respect to Wisconsin agencies see: PRELIMINARY REPORT TO THE 1953 LEGISLATURE BY THE SPECIAL JOINT COMMITTEE ON RULE MAKING, May 20, 1953, pp. 15-16.

¹¹ WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, pp. 33-34.

¹² WIS. STATS. (1953) §227.04.

¹³ These agencies were: the Public Service Commission, the Board of Health, the Industrial Commission and the Conservation Commission. Such petitions, the agencies agree, were most infrequent. See WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, Dec. 1954, pp. 33-34.

¹⁴ Of the 46 agencies analyzed by the Wisconsin Legislative Council, only 12 had adopted rules of procedure in compliance with the statutory directive contained in WIS. STATS. (1953) §227.04.

¹⁵ It should be noted, however, the petition procedures for the Conservation Commission and the Industrial Commission relating to adoption, modification or repeal of certain rules are spelled out elsewhere in the statutes. For those of the Conservation Commission see: WIS. STATS. (1953) §29.174(3).

¹⁶ See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part I, pp. iii and 16.

recommendation was incorporated in Bill No. 5, S.—the REVISED ADMINISTRATIVE PROCEDURE ACT—which was enacted into law by the 1955 legislature.¹⁷ It states:

"Except where the right to petition for a rule is restricted by statute to a designated group or except where the form of procedure for such petition is otherwise prescribed by statute, any municipality or any 5 or more persons having an interest in a rule may petition an agency requesting the adoption, amendment or repeal of such rule."

It would appear from the wording of this section that the procedures of the Conservation Commission in the area of fish and game regulations (to be discussed shortly) will not be affected, since they are "otherwise prescribed by statute."¹⁸

STATUTORY PROVISIONS GOVERNING CONSERVATION RULE MAKING

Statutory grants of rule making authority to the Conservation Commission have been broad and cover a multitude of subjects. At least 21 sections of the Wisconsin statutes confer rule making authority upon the commission. These statutes fall into three major classes—those conferring general rule making authority,¹⁹ those relating to rule making in specific areas,²⁰ and those statutes containing what might be considered borderline grants of rule making authority.²¹

A good example of a section of the statutes delegating general rule making authority to the commission states:²²

"The commission is hereby authorized to make such rules and regulations, inaugurate such studies, investigations and surveys, and establish such services as they may deem necessary to carry out the provisions and purposes of this act, and any violations of any provisions of this act, or of any rules or regulations promulgated by the commission, shall constitute a misdemeanor . . ."

An example of a statutory provision containing grants of rule making authority of a more specific nature states:²³

¹⁷ Wis. Laws 1955, c. 221, §227.015.

¹⁸ Despite repeated assurances by the Legislative Council Committee and its staff that procedures of the Conservation Commission in this area will not be significantly altered, the feeling appears to persist among various department representatives that the newly revised ADMINISTRATIVE PROCEDURE ACT will seriously complicate matters. This was brought out publicly by Conservation Commissioner-elect Arthur R. MacArthur in his opening address to the Twentieth Conservation Congress meeting in Madison, June 6, 1955.

¹⁹ Wis. STATS. (1953) §§23.09(7), 23.12.

²⁰ Wis. STATS. (1953) §§23.11(1), 26.12(1),(2),(5), 26.205, 27.01(2)(j)(k), 28.02(1), 29.085, 29.12(4), 29.574(6)(a), 29.137(1),(5),(6), 29.174, 29.175, 29.255, 29.29(4), 29.38, 29.396, 29.475, 29.536(4), 29.54, 29.56, 29.57(1), 29.573-(2),(3),(6),(a), 29.574(1),(3), 29.578(1),(4),(16), 29.60(5)(c), 29.283.

²¹ Wis. STATS. (1953) §§26.14(4), 29.06(2), 29.13(3), 29.134(3), 29.135(5), 29.147(2), 29.17(2), 29.52(4).

²² Wis. STATS. (1953) §23.09(7).

²³ Wis. STATS. (1953) §29.174(2).

"It shall be the duty of the Conservation Commission and it shall have power and authority to establish open and close seasons, bag limits, size limits, rest days and other conditions governing the taking of fish or game in accordance with the public policy declared in subsection (1)."

An illustration of what might be called a borderline grant of rule making authority is found in WIS. STATS., (1953) Section 29.06(2) dealing with the Conservation Commission's authority to sell confiscated game. This section provides in part:

"The animals, or carcasses or parts thereof, so purchased shall be consumed or otherwise disposed of by the purchaser within a period of time to be set by the conservation commission . . ."

SOURCES OF CONSERVATION RULES

Department Personnel. When looking specifically at the initiation of conservation rules one is forced to conclude that though commission rules are initiated in various fashions, the bulk of such rules are initiated by personnel of the Conservation Department.²⁴ Probably the most uniquely formalized process relates to the establishment of forest protection districts. Rules dealing with such districts normally stem from petitions from County Boards requesting that certain lands be included in forest protection districts. In each instance of this type, the district ranger meets with the Forestry Committee of the County Board, and following a series of conferences and jointly-conducted surveys, the proposed forest protection district is charted.²⁵ It is the ranger who then recommends to the commission that a rule be drafted, and this recommendation initiates the rule making process.

At the Conservation Commission meeting of December 13, 1953, for example, Mr. LeMay, chief forest ranger, explained that for a number of years it had been considered advisable to extend the benefits of organized fire protection to the state as a whole. He stressed the need for bringing additional protection to certain large areas that bordered on existing forest protection districts, and recommended the establishment of a new district in this fringe area. This new district which was to be classified as District 11 was to include Waushara, Waupaca, Marquette and Green Lake Counties. Following the presentation by Mr. LeMay, the commission received a summary of data regarding the boundaries and the cost of establishing the proposed district. After this material had been discussed by the commission, Commissioner Smith moved that, "in accordance with the department's

²⁴ A brief summary of the Conservation Commission's rule making process before adoption of the revised ADMINISTRATIVE PROCEDURE ACT may be found in: WISCONSIN LEGISLATIVE COUNCIL, INTERIM REPORT ON ADMINISTRATIVE RULE MAKING, No. I, August 1953, pp. 73-93. The rule making processes of most other Wisconsin agencies is discussed in Volume II of the above study.

²⁵ Such procedures are provided for in WIS. STATS. (1953) §77.02.

recommendations" the department be authorized to establish forest protection district 11.²⁶

There are, however, occasional instances in which sources other than department personnel have been instrumental in initiating rules relating to forest protection districts. Mr. F. B. Trenk, Extension Forester of the University of Wisconsin appeared before the Conservation Commission on June 11, 1954 to represent a citizen's committee sponsoring the Lower Wisconsin River Valley Reforestation Project. He urged the creation of a forest protection district and improved forest fire control measures in the area in which the group's programs of reforestation were being conducted. Chief forest ranger LeMay agreed with this proposal and also recommended the creation of such a district after a study had been completed into various legal problems regarding controlled burning on state lands nearby. Commission Chairman Rahr informed Mr. Trenk that provisions would be made in the budget for the requested measures, but that the change could not be activated until July 1, 1955.²⁷

Rules governing fish and game refuges also originate within the department.²⁸ Rules of this nature are usually the product of field studies by technically trained employes of the department.²⁹ The usual procedure relating to refuge rules is for the local field officer to certify his recommendations for a rule through the local fish management or game management division. For example, the game coordinator for the southern area of the state wrote in a memorandum to the conservation director, "I recommend the establishment of the proposed Terry Hill game refuge in Waupaca county for a period of five years."³⁰

In another instance, Dr. Schneberger of the Conservation Department informed the commission that the testimony at a public hearing regarding maintaining a fish refuge on Gilbert Lake favored continuation of this refuge. He therefore recommended that the commission retain the rule designating this area as a fish refuge even though a fish refuge from the standpoint of fish management was not justified. Many other values, he stressed, should be considered in attempting to keep this site as a wilderness area in a densely populated area of the

²⁶ CONSERVATION COMMISSION MINUTES, Dec. 13, 1955, p. 6.

²⁷ CONSERVATION COMMISSION MINUTES, June 11, 1954, pp. 16-17.

²⁸ See: WIS. STATS. (1953) §§29.57 and 23.09.

²⁹ Property owners, at times, have requested the commission to include their property within a state refuge to take advantage of subsequent department-directed policing. The policy of the commission, however, is normally to refuse to act on such requests.

³⁰ Rule #GR-774 (1950). See also: CONSERVATION COMMISSION MINUTES, August 13, 1954, p. 15; WISCONSIN CONSERVATION DEPARTMENT, ACTIVITIES PROGRESS REPORT (hereafter cited ACTIVITIES PROGRESS REPORT) May 1955, pp. 14-15.

state. The commission formally accepted Dr. Schneberger's recommendation.³¹

Similar procedures are followed regarding the initiation of rules rescinding orders establishing fish and game refuges. At the Conservation Commission meeting of July, 1954, Dr. Schneberger referred to Order No. FR-591 establishing a fish refuge of considerable size in the Meadow Valley Unit of the Central Wisconsin Conservation Area in Juneau and Monroe counties. He explained that an abundant supply of minnows existed in the area which should be harvested. The public, he thought, should be given the opportunity to harvest the minnow supply. Moreover, the rescission of the refuge order would improve public relations. Dr. Schneberger's recommendation was adopted unanimously by the commission.³²

In some instances, however, private groups are responsible for the initiation of rules affecting refuges. Several years ago the commission received a letter from Notre Dame University requesting that all units of the university's lands in Vilas County be removed from the list of refuges. The rules establishing this refuge as originally adopted in 1937 and 1940 were to run for 99 years. The university's communication requesting rescission of the refuge rule gave as the reason the fact that the increased population of deer and other animals in the refuge area were responsible for large scale destruction of young trees planted by the university in its reforestation program. Mr. Grimmer of the Conservation Department also recommended rescinding these orders and the commission unanimously concurred in the recommendation.³³

Among the more controversial of conservation rules are those relating to seasons and bag limits on fish and game. In a very real sense many of these also are initiated by personnel of the department. Technically trained fish biologists and game managers who have been closely observing the fish and game supply may conclude that present rules on the subject should be altered either to increase or restrict the bag limits on a given species.³⁴ Such a recommendation generally takes the form of a proposed rule included in the questionnaire submitted for vote at each of the yearly county meetings where delegates to the Conservation Congress are elected, and where the consensus of county sentiment regarding future hunting and fishing regulations is obtained.

In special or emergency situations, a rule initiated in this fashion and dealing with fish and game regulations may be submitted directly

³¹ CONSERVATION COMMISSION MINUTES, July 9, 1954, p. 10.

³² CONSERVATION COMMISSION MINUTES, July 9, 1955, p. 10.

³³ CONSERVATION COMMISSION MINUTES, July 16, 1953, p. 24.

³⁴ For example, an open season on cottontail rabbits was established for Milwaukee County when the commission found that, "the supply of cottontail rabbit in Milwaukee County is such that they are causing extensive and widespread damage to gardens, trees, shrubbery, orchards and other property." See: Rule #G-777 (1951).

to the commission at its next meeting for action. For example, Chief Warden Hadland appeared at the commission meeting of August 13, 1954 to recommend that the rule limiting the use of 50 artificial decoys for waterfowl hunting be eliminated. He explained that it was impractical to attempt to enforce this rule and that there was no similar federal regulation. His recommendation was unanimously approved by the commission.³⁵

Private Groups. Second to department personnel, the next major source of rule making in conservation consists of private individuals or groups. Almost all conservation rules stem from either the commission on "its own motion" or on petition from interested parties. An investigation of all active rules which are kept on file in the Conservation Department offices reveals that when a rule originated with the commission, the rule on file indicates this fact. When private individuals or groups were responsible for the initiation of a rule, the rule on file seldom indicates this fact. However, if it does, no specific mention of the parties involved is made.³⁶

The fact that rules seldom indicate the specific private parties responsible for their initiation perhaps can best be explained by the manner in which such private individuals or groups function. Most frequently they do not carry their activities through all phases of the semi-formal rule making process, but rather step in at one stage to make their views known to the major policy formulators. This may be illustrated by the circumstances surrounding the commission's adoption of the rule regulating hours for ice-fishing during the 1954-55 season.

The Conservation Department recommended a rule permitting all-night ice fishing. The county meetings and the Congress, while agreeing to lengthen the hours for ice-fishing, refused to adopt the department's recommendations. However, when the matter came before the commission for action, the Executive Council of the Conservation Congress, meeting with the commission, was persuaded by the department's views and informed the commission that it favored the all-night season. (The council's statement was put in such a fashion, however, that it was not clear whether the congress or the council was favoring the ice-fishing rule.) The commission then adopted a rule permitting all-night ice-fishing. But at the next meeting,

³⁵ CONSERVATION COMMISSION MINUTES, August 13, 1954, p. 30.

³⁶ See for example: Rule #G-799 (Amend. 1) (1952) which states that it was made, "Upon request of the citizens of the state of Wisconsin to close certain areas to hunting and trapping." Rule #SG-252 (Rev. 2) (1945) resulted from petitions of "owners and operators of improved cranberry marsh areas."

At other times collateral file material indicates that a rule was initiated by a private group.

individuals representing southeastern counties contacted some commissioners by telephone and also appeared at the commission meeting to oppose this rule. This resulted in the commission changing the final form of the rule to conform essentially to that recommended by the congress.³⁷ A slightly different technique was followed regarding the rules involving bullhead fishing and otter trapping in 1954. Here, private groups appeared before the commission opposing the congress' recommendations. The rules which the commission finally adopted indicate that the private groups were at least partially successful in selling their views to the commission in place of the recommendations of the Conservation Congress.

When department recommendations clash with the desires of private groups before the commission, the department not infrequently comes out second best. At its February, 1954 meeting, the commission received a letter from the district attorney of Burnett County objecting to the rule permitting spearing of rough fish there while it was prohibited in the surrounding counties. Dr. Schneberger informed the commission that the Conservation Congress delegates from Burnett County had erroneously voted to favor opening that county to spearing. He recommended, however, that the rule remain unchanged since fish management and law enforcement personnel would closely scrutinize the situation for possible damage to game fish during the coming year. If significant damage occurred, the rule could be changed the next year. Commissioner Moreland, nonetheless, refused to accept Dr. Schneberger's recommendation and moved to rescind the order permitting spearing. His motion carried unanimously.³⁸

The influence of private groups over the initiation of rules extends beyond rules affecting fish and game regulations. A single example of their activities in other areas must suffice here. At the May 14, 1954 meeting of the commission a group headed by ex-Senator Bubolz appeared to urge the adoption of a rule creating the High Cliff State Forest Park on Lake Winnebago. After listening to a detailed presentation of the merits of this proposal by the senator, the commission unanimously voted to adopt the rule establishing this forest park.³⁹

Legislation. Because of the volume of legislation authorizing rule making by the Conservation Commission, it is not surprising that a third source of conservation rules stems from alterations in the statute law.

An illustration of this fact occurred in 1953 when the Superintendent

³⁷ For a record of these activities see: CONSERVATION COMMISSION MINUTES, Nov. 12, 1954.

³⁸ CONSERVATION COMMISSION MINUTES, Feb. 19, 1954, p. 4. For additional examples of this see: CONSERVATION COMMISSION MINUTES, Nov. 12, 1954, p. 16.

³⁹ CONSERVATION COMMISSION MINUTES, May 1954, pp. 17-18.

ent of the Fish Management Division appeared before the commission at its April meeting to recommend the adoption of a new rule. Dr. Schneberger noted that this item was in the nature of an emergency rule since the legislature had just passed a new law (Bill No. 141,A.) permitting the licensing of trammel nets and that the governor was expected to sign it immediately. The urgency of the measure, he explained, seemed to be traceable to the growing competition for fishing in the Mississippi River between Iowa and Wisconsin fishermen. Thus, the department was submitting to the commission a rule permitting the use of trammel nets. Inasmuch as the department did not have an opportunity to hold hearings on the rule and since the department lacked experience in the use of trammel nets, the rule had been kept relatively simple, Dr. Schneberger pointed out. The commission quickly voted to adopt this rule.⁴⁰

Federal Government. The area in which the federal government exerts the most obvious influence in the initiation of conservation rules relates to the regulations governing migratory waterfowl. Rules adopted by the Wisconsin Conservation Commission in this area must always keep within the provisions of Interior Department regulations as provided for in the federal MIGRATORY BIRD TREATY ACT.⁴¹ In fact, however, the Interior Department's regulations in many instances result from agreements reached at regional conferences between representatives of the United States Fish and Wildlife Service and the State Conservation Department.

In Wisconsin the normal course in initiating such rules is for representatives of the department first to apprise the Conservation Congress of the federal regulations and the recommendations of the Mississippi Flyway Conference. The congress next recommends to the commission potential rules for the state. The commission then acts upon these recommendations as well as any additional recommendations on the subject that the department may see fit to offer.⁴² In acknowledging the role of the federal government, one Wisconsin rule states that the Conservation Commission has investigated the supply of waterfowl and concluded that it would be adequately protected if regulations were adopted as prescribed by the Secretary of Interior under provisions of the federal MIGRATORY BIRD TREATY ACT.⁴³

Cooperative action on the part of the United States Fish and Wildlife Service and the Wisconsin Conservation Department is responsible for initiating rules affecting federal wildlife refuges such as those

⁴⁰ CONSERVATION COMMISSION MINUTES, April 10, 1953, p. 10.

⁴¹ 16 U.S.C.A. 718.

⁴² For a record of the stages in this process see for example: CONSERVATION COMMISSION MINUTES, August 14, 1954, p. 24.

⁴³ Rule #GB-798 (1952).

at Neceedah and the Horicon Marsh. At the September 10, 1954 meeting of the Conservation Commission, Mr. Grimmer, superintendent of game management, requested approval of a new provision in the rule governing seasons on fur bearing animals at the Horicon Marsh. He explained that this recommendation stemmed from the game management and the law enforcement divisions and sought to clarify fur harvests on the federally owned lands at Horicon. It was recommended that a provision be added to the existing rule on the subject stating:

"At the discretion of the Fish and Wildlife Service, an open season on all fur-bearing animals (i.e., muskrat, mink, racoon, opossum, weasel and fox) within the Horicon National Wildlife Refuge may be declared under written permit from the Fish and Wildlife Service or their authorized representative, and with the approval of the conservation director, between the dates of October 25, 1954 and April 15, 1955."

The change in rules was unanimously adopted by the Conservation Commission.⁴⁴

National Associations. A number of national conservation associations, whose membership is composed of state conservation officials, are another source of conservation rules in Wisconsin. However, it appears that their role as initiators of rules has been indirect, and as a result is difficult to document. Representatives of the department agree that while such associations have had a profound influence on the substantive provisions of many conservation rules, it is almost impossible to point to a specific rule and say that it resulted from a specific idea outlined at a given conference. Indeed, some representatives of the department have indicated that the present administrative arrangement of a 6-man, unpaid commission system for conservation regulation in Wisconsin was first recommended at a national conference of conservation officials in the early 1920's.

What normally occurs in such cases is that theories expressed at a national meeting may form the basis of discussions at a number of department meetings. If a favorable consensus is achieved among department representatives, attempts will be made to convince the commission and the congress (or in some cases the legislature) of the plan's feasibility. Thus several years may have passed before an idea first expressed at a national association meeting is promulgated as a Wisconsin conservation rule. The current policy of the department in urging the liberalizing of size and bag limits on most species of fish in the state is an example of the procedure just outlined. The theory behind this approach was first presented several years ago at the meet-

⁴⁴ CONSERVATION COMMISSION MINUTES, September 10, 1954, p. 15.

ing of the American Fishery Society and stemmed from research done by officials of the Tennessee Valley Authority and by the Ohio Conservation Department. Up to this time, the plan has been accepted only on an experimental basis on certain specified lakes in Wisconsin, although there are prospects of applying it on a statewide basis in the future.⁴⁵

Conservation Advisory Committees. Wisconsin is usually credited with conceiving the idea of utilizing advisory committees in the administrative process.⁴⁶ Such committees are normally composed of interested citizens, regarded as experts in their own areas, who are called upon to advise an agency on its actions in the committee member's field of specialty. These committees may either be relatively permanent, or may be established for a single, specified purpose.

One writer has classified advisory committees as "legionary, fugitive and inherently particular."⁴⁷ Their utility has been summarized as in "breaking proposed administrative measures on the back of the public," and in sharing public if not legal responsibility for administrative conclusions and recommendations.⁴⁸ Moreover, they perform a service to an agency by enabling the agency to maintain close personal contacts with groups who are in a position to help or harm it by a variety of political means. Furthermore, if a favorable opinion can be achieved on the part of members of the advisory committee, this often will go far in creating favorable sentiments among other groups and individuals affected by the agency's regulation. Another advantage of a representative advisory committee, if it is functioning properly, is that it can furnish an excellent test of the reasonableness of a proposed administrative rule.⁴⁹

The functions of an advisory committee are two-fold—those of an external and of an internal nature. These functions have been summarized as follows:⁵⁰

External:

1. interpreting the work of the agency to the public
2. giving sponsorship and prestige
3. raising money, influencing appropriations and securing amendments
4. interpreting the community to the staff

⁴⁵ For a recent story discussing this approach to fish management in Wisconsin see: *WISCONSIN STATE JOURNAL*, August 14, 1955.

⁴⁶ See: J. R. Commons, *Myself*, New York, 1934, pp. 154-59.

⁴⁷ See: A. W. MacMahon, *Boards, Advisory*, *ENCYCLOPAEDIA OF SOCIAL SCIENCES*, II, pp. 609-611.

⁴⁸ See: J. A. Salter, *Allied Shipping Control*, Oxford, 1921, pp. 259-262.

⁴⁹ For a summary of the functions and advantages of advisory committees see: A. Leirson, *Administrative Regulation*, Chicago, 1942, Ch. 6.

⁵⁰ C. King, *Social Agency Boards and How to Serve on Them*, 73 *MIDMONTHLY SURVEY* 342 (1937).

Internal:

1. advising on decisions of policy
2. scrutinizing and criticising policies and procedures.

There would seem to be several weaknesses inherent in the use of advisory committees in the administrative process. First, energetic committees often tend to assume a supervisory attitude and to act as if they were primarily responsible for administrative policy. At least one writer feels that for this reason, many administrators prefer special purpose committees which are established to advise on a single specific problem rather than permanent committees.⁵¹ Second, nothing will cause the activity of an advisory committee to flag more than the feeling that it is not influential in decision making. Thus an agency is faced with a delicate situation each time it feels it necessary to ignore or act contrary to the recommendations of such a committee. Both of these problems have confronted the Conservation Department and Commission in their dealings with various advisory committees.

The Conservation Commission has developed a unique and far-reaching system of advisory committees to aid its rule making and policy formulating activities.⁵² These may be considered a fifth, and most significant source of conservation rules in Wisconsin. The most influential and unusual of these committees is the Conservation Congress.⁵³ The functions of this so-called shirt sleeved democracy are worthy of being summarized in some detail.

The Conservation Congress System. Procedures established by the commission require that at least one county meeting be held annually in each county of the state at which all qualified voters of the county may participate.⁵⁴ A county committee of five members (3 regular and 2 alternate members) is elected from each county at this meeting, which is presided over by a representative of the department.⁵⁵ These committees then represent the people of their counties

⁵¹ See: Lierson, *op. cit.*, p. 165.

⁵² WIS. STATS. (1953) §29.174(4) specifically authorizes the commission to "organize advisory committees to advise it on any matters under consideration."

⁵³ For commentaries on the functions, problems and accomplishments of the Conservation Congress see: R. Hemp, *The Wisconsin Conservation Congress: Its Functions and Objectives*, WISCONSIN CONSERVATION BULLETIN, April, 1951, Vol. 16, pp. 1-6; W. E. Scott, *The State Conservation Congress*, WISCONSIN CONSERVATION BULLETIN, August, 1952, Vol. 17, pp. 20-21; L. P. Voight, *Teamwork for Wisconsin Conservation*, WISCONSIN CONSERVATION BULLETIN, August, 1954, Vol. 19, p. 3; *Highlights of the Conservation Congress Meeting*, WISCONSIN CONSERVATION BULLETIN, July, 1953, Vol. 18, pp. 11-12; *Hold Public Hearings to Set 1933 Game Laws*, MONTHLY SURVEY, July, 1933, pp. 7-8; W. E. Scott, *The Public's Part in Wisconsin Conservation History*, WISCONSIN CONSERVATION BULLETIN, June, 1948, Vol. 13, pp. 84-91.

⁵⁴ CODE OF PROCEDURE OF THE WISCONSIN CONSERVATION CONGRESS AND EXECUTIVE CONSERVATION COUNCIL, §1(a).

⁵⁵ THE CODE OF PROCEDURE, §1(c) provides that "no two of the five members

at the annual meeting of the Conservation Congress in Madison. The other important function of the county meeting is to obtain an expression of local attitudes toward proposed fish and game rules of the department and commission, which appear in questionnaire form and upon which all of those present at the meeting are entitled to vote.

The questionnaires have traditionally been framed in such a manner that one may either agree or disagree with the department's proposal to make an alternative suggestion. Most questions are preceded by a short explanatory note outlining the rationale for the rule. In the past, however, the form of the questionnaire has come under fire from critics because it did not precisely frame the proposed rule in the language which would eventually be used, but merely summarized the general idea behind the rule. Some have felt that this arrangement permitted the department to interpret the results of the questionnaires in a variety of ways. The 1955 questionnaire, however, reflects the department's cognizance of these criticisms. In this questionnaire the proposed rules are worded in essentially the same fashion that they will be when promulgated.

It should also be noted that various members of the Conservation Commission also have been responsible for certain sections in the questionnaires. At the July, 1953 meeting of the commission, for example, Commissioner Moreland commented that he would like to have the question of running bear with dogs discussed. Mr. Grimmer of the department then said that this question would be placed on the county questionnaire for discussion at the county meetings in 1954.⁵⁶

All questions are discussed at the meeting before the vote is taken. Following the voting, each county committee is directed to tabulate the answers and the alternate suggestions and send summary copies of the fish and game questionnaires to the Conservation Department. Moreover, the transcript of each meeting must also be sent to the department. While such transcripts are not verbatim records of the meeting, they tend to reveal the nature of the discussion that transpired. Upon receipt of the county data, the department makes a final summary, copies of which are widely circulated throughout the state prior to the annual meeting of the congress. These findings are also compiled in the form of colored maps which are regularly referred to throughout the deliberations of the Conservation Congress.

One month following the county meetings, the Conservation Congress meets in an annual session which usually lasts for two days. The purposes of its deliberations as set forth in its rules are to:⁵⁷

shall be residents of the same civil town, city or village" with the exception of Milwaukee.

⁵⁶ CONSERVATION COMMISSION MINUTES, July 16, 1953, p. 30.

⁵⁷ CODE OF PROCEDURE, §II(b).

- “1. Unify the results of the County Fish and Game Hearings
2. Consider resolutions pertaining to conservation matters
3. Request enactment or rejection of legislation in the interests of good conservation
4. Receive and discuss technical data and pass on to the commission such information, advice and recommendations as it shall see fit relative to conservation matters.”

The agenda of the meetings is prepared by the Executive Council of the Conservation Congress with the aid of the department. The meetings are conducted by officers of the congress with departmental personnel presenting a summary of census and habitat conditions prior to the vote on each proposed fish and game rule. The meeting is conducted pursuant to rules adopted by the congress, its rules committee and, in the event of a hiatus, by resort to Robert's Rules of Order.⁵⁸ Each county is entitled to one vote in the balloting, and requests for an official poll of an individual county's delegates are not infrequent. Voting is done by a voice vote or by a show of the official county placards. However, if the results are not clear (as is frequently the case) a roll call is taken by counties in alphabetical order.⁵⁹ In addition to the normal procedure just outlined for informing the commission of local attitudes, motions for proposed rules are entertained from the floor. If they pass they also constitute advisory recommendations to the Conservation Commission.

Prior to 1953, the congress recommendations regarding fish regulations were considered by the commission in two separate meetings in July and August. At the May, 1953, commission meeting, however, then-director Swift relayed to the commission a department recommendation that the fish and game rules be considered at a two-day meeting in July rather than devoting two separate meetings to this. It was noted that such an arrangement would preclude the necessity for the executive council of the congress from attending two separate meetings a month apart. “Without formal action” the commission has since followed this recommendation.⁶⁰

The recommendations of the congress are, of course, not binding on the commission. During the last five years, however, the commission has accepted the congress' recommendations on an average of 95 percent of the time and in several of these years, the commission has accepted 100 percent of the congress' recommendations.⁶¹ During

⁵⁸ *Ibid.*, §II(e).

⁵⁹ For the first time in history the congress' deer season recommendation was adopted by a voice vote at the Twentieth Wisconsin Conservation Congress meeting June 6, 1955.

⁶⁰ CONSERVATION COMMISSION MINUTES, May 14, 1953, p. 19.

⁶¹ These figures were recently compiled by representatives of the department. Mr. Ed. Palmer, Chairman of the Conservation Congress in an address before that body June 6, 1955, also stressed this point. See also: Hemp, *op. cit.*, p. 1.

the furious debates over an any-deer season in Wisconsin which occurred in the late 1940's, however, most department representatives agree, the incidence of agreement between the commission and the congress was considerably lower than during the last several years.

Commission action in 1955 indicated that the commission intended to approve considerably less than the usual 95 percent of the congress' recommendations, particularly in the field of game regulations. At its meeting in Wautoma on July 8, 1955, the commission refused to accept a particularly large number of congress recommendations. Indeed, the commission refused to accept the major portion of the recommendations regarding game regulations for the coming year. This is particularly striking in that the 1955 congress recommendations generally paralleled the recommendations of the department to a degree seldom equalled in the past. The commission action caused considerable criticism and speculation as to the future role of the congress in Wisconsin conservation programming.⁶² The commission, however, was quick to understand the public sentiment on the subject and took special pains at its next meeting in Bayfield, August 11, 1955, to adopt a Joint Statement of Cooperation for the commission and the congress.

This statement pointed out that, "Impressions of a lack of commission appreciation for the work and purpose of the congress were completely dispelled by the commission." The commission expressed appreciation for the sincere efforts and sound advice generally received from the congress over the years. One of the chief reasons for the success of Wisconsin conservation programs in the past was due to the unselfish service of private citizens, the statement emphasized. Moreover, "It was clearly understood that the Congress was only advisory to the Commission which makes all final decisions in the rule making process." The congress was assured recognition as an official medium of expression representing the people of the state on game and fish regulations based upon public hearings. Furthermore, it was concluded that future misunderstandings could be avoided through improved communication and more frequent contact between the commission and the congress' Executive Council. "The primary effort in this direction," the statement significantly explained, "will be made in development by the congress and the department of a new procedure for processing hunting and fishing rules based on recent

⁶² An indication of the lack of agreement between the congress and the commission over game and fish regulations may be seen by comparing the recommendations of the congress in the *WISCONSIN STATE JOURNAL*, June 8, 1955, and the actual rules adopted by the commission as listed in the *WISCONSIN STATE JOURNAL*, July 10, 1955. For an editorial criticizing the commission for its action see: *MILWAUKEE JOURNAL*, July 18, 1955. See also: *SUPERIOR EVENING TELEGRAM*, August 8, 1955; R. G. Lynch, "Maybe I'm Wrong," *MILWAUKEE JOURNAL*, August 14, 1955.

legislation on this subject. After mutual review, these new mechanics will be submitted to the commission for approval."

Strained relations between the commission and the congress did not, however, originate in 1955. Evidence of congress unrest in this area was brought into the open at the January, 1953, commission meeting when Mr. E. W. Palmer, chairman of the Pierce County Congress Committee appeared before the commission representing the action committee of the Executive Council of the congress. Mr. Palmer emphasized his concern over the effect of pressure groups on conservation regulation in Wisconsin. He went on to remind the commission that the congress and its executive council had been formed to represent the public in these matters, but that recently certain pressure groups had been quite successful in by-passing the congress and going directly to the commission or the governor with controversial problems. The Executive Council, he said, did not want to become a pressure group, but it was forced to the conclusion that it must organize an action committee to work on this problem. As a result of the committee's conferences with the governor, it had been concluded that the governor's research director would attend future meetings of the congress and the council.

Mr. Palmer discussed with the commission a proposed arrangement whereby the congress would fix the pattern by which the public could make its wishes felt on any matter. There should be more adequate arrangements for public hearings in this area, for, he stressed, those who do not attend the May public meetings should not be permitted to pressure the commission or the council with their problems, and these bodies could then act as buffers between the private interest groups and the commission or governor. Commissioner Smith asked that this plan be submitted to the commission after the council had prepared it in final form, but no formal commission action was taken regarding these proposals.⁶³

The Executive Conservation Council. Since the congress meets but once a year in general assembly the need was felt for a body which would be available at various times during the year to inform the commission of the conservationist's sentiments on current problems.⁶⁴ The 71 counties of the state are divided into 11 districts, and the county committees of a given district elect two committee members annually to serve one-year terms on the Executive Conservation Council. The council functions as the Congress' Executive Committee throughout the year. In turn, the 22 members of the council annually elect a chairman, vice chairman and secretary-treasurer,

⁶³ CONSERVATION COMMISSION MINUTES, Jan. 9, 1953, p. 8.

⁶⁴ CODE OF PROCEDURE, §III.

who serve in the same capacity to the congress. At least four and sometime five meetings of the council are held annually. It also meets with the commission when the game season rules and the fish season rules are adopted.⁶⁵

The code of procedure of the Wisconsin Conservation Congress and Executive Conservation Council provides that the council is responsible for the conduct of congress members and may recommend that the commission remove any congress member for, "conduct determined to be unbecoming of a congress member."⁶⁶ In at least one instance, the authority granted by this section has been utilized. At the January 15, 1954 meeting of the commission, then-director Swift informed that body that at a meeting of the Executive Council several weeks earlier, the convictions of Dr. W. Bauer and Mr. Harry E. Lounsberry for conservation law violations were considered. A motion was adopted by the council to recommend to the commission that these members be suspended from activities of the congress and that the commission notify these men that they were no longer members of the congress. It was further recommended that the vacancy caused by Dr. Bauer's suspension be filled by the appointment of John Lynch as co-chairman of the trout committee. The commission unanimously approved this recommendation.⁶⁷ Normally, however, the list of congress members submitted by the director to the commission for its approval is accepted relatively automatically by the commission.⁶⁸

In addition to the Executive Council the congress provided for the establishment of a series of special study committees in 1948. These committees also operate on a year-around basis and are made up of members of the congress. Membership varies from five to seven and the committees have as leaders two members of the council who are appointed by the council chairman, subject to the approval of the council. Attempts are made to select committee members on the basis of interest, ability and geographical location (since it is felt desirable to achieve state-wide distribution of the committee.)⁶⁹ To qualify as advisory committees these groups must also receive the approval of the Conservation Commission. The committees report their findings and conclusions to the annual meeting of the congress. During the Twentieth Wisconsin Conservation Congress meeting on June 6, 1955,

⁶⁵ CODE OF PROCEDURE, §III(a)(4).

⁶⁶ *Ibid.*, §III(a)(4).

⁶⁷ CONSERVATION COMMISSION MINUTES, Jan. 15, 1954, p. 6. See also: CONSERVATION COMMISSION MINUTES, Nov. 13, 1953, p. 18.

⁶⁸ See for example: CONSERVATION COMMISSION MINUTES, June 11, 1954, p. 7.

⁶⁹ Certain conservation congressmen appear to feel that the selection of committee members sometimes goes to the men who shout the loudest and to the perennial malcontents.

five committees of this type reported—committees dealing with upland game, waterfowl, fur, big game, fish and trout.⁷⁰

Great Lakes Fishery Advisory Committee. Although the conservation congress system is probably the most complex advisory committee, the Conservation Commission maintains several other advisory committees which perform important functions relating to the initiation of rules. The Great Lakes Fishery Advisory Committee, created in 1938, represents the interests of sportsmen, commercial fishermen and wholesale fish dealers.⁷¹ These groups initially recommend individuals from their midst for positions on the committee. The list of such recommendations are presented to the department which then presents the names to the commission for its approval. Normally, commission approval follows almost automatically.⁷²

Before this advisory committee meets to determine its recommendation to the commission regarding proposed rules affecting Great Lakes fishing, a series of public meetings are held throughout those areas of Wisconsin bordering on the Great Lakes to test the sentiment of commercial fishermen on these proposals. There is ample evidence to indicate that many of the views expressed at these hearings find their way into the advisory committee's recommendations to the department and hence to the commission.⁷³

It is customary for department personnel to outline this process to the commission before it acts on the final rule. Thus at its November, 1953 meeting, the commission was informed by Dr. Schneberger of the department that public hearings were held for rules affecting Lake Michigan at Green Bay on August 24, 25, and 26 at Milwaukee, Sturgeon Bay and Oconto and for rules affecting Lake Superior at Washburn on August 27. The results of these hearings were discussed with the Great Lakes Advisory Committee at its October

⁷⁰ In addition to these committees devoted to specific fish and game varieties, the congress also heard reports from its Education and Public Relations Committee and its Resolutions Committee.

⁷¹ For a discussion of the Great Lakes Fishery Advisory Committee see: E. Schneberger, *Wisconsin Fish Management*, WISCONSIN CONSERVATION BULLETIN, June 1948, Vol. 13, pp. 67-75; E. Swift, *Policy Regarding Relationship Between Research and Administration*, WISCONSIN CONSERVATION BULLETIN, Nov. 1952, Vol. 17, pp. 17-22; R. A. Gray, *Rough Fish History*, WISCONSIN CONSERVATION BULLETIN, April 1942, Vol. 7, pp. 8-11; T. H. Langlois, *The Roles of Legal Restriction in Fish Management*, WISCONSIN CONSERVATION BULLETIN, Aug.-Sept., 1944, Vol. 9, pp. 27-29; *Great Lakes Fishing*, WISCONSIN CONSERVATION BULLETIN, Oct. 1937, Vol. 2, pp. 20-25; *Minutes of the Great Lakes Fishery Advisory Committee*, Wisconsin Conservation Department.

⁷² For an example of this process see: CONSERVATION COMMISSION MINUTES, November 12, 1954, p. 23.

⁷³ Compare for example: *Transcript of Public Hearing on Great Lakes Fishing*, Milwaukee Court House, July 19, 1954 to the final rules approved by the commission as spelled out in the CONSERVATION COMMISSION MINUTES, Oct. 7, 1954.

meeting. On the basis of these two actions, together with discussions with field personnel of the Fish Management Division and the Law Enforcement Division of the department changes in existing rules were recommended to the commission at this meeting, Dr. Schneberger explained. After these proposed changes were outlined, they were accepted by the commission with little discussion.⁷⁴

Representatives of the department agree that the commission normally attaches great weight to the recommendations of this body regarding the drafting of various rules affecting the Great Lakes. The assistant director noted, for example, one rule initiated in this fashion and regulating fishing in outlying waters of the state which resolved what "was at one time a very controversial issue."⁷⁵ Interestingly enough, the rule recites that it resulted in part from still another advisory group. It states that the rule evolved "on the basis of recommendations made by the Council of State Governments, which is an organization attempting to bring about uniformity in state regulations."

This is not an isolated example of the relationship between the Council of State Governments and Wisconsin conservation agencies. At the Conservation Commission meeting on March 27, 1953, Dr. Schneberger called attention to current problems relating to non-resident commercial fishing licenses in the Great Lakes. After outlining attempts to bring more uniformity into the regulations of various state's governing Great Lakes fishing, Dr. Schneberger explained that Michigan's action in raising its license fees had worked a real hardship on Wisconsin's Washington Island fishermen. These fishermen informed the department that if they did not obtain some relief soon, they intended to start court action testing licensing procedures generally. Since the law regarding licensing procedures was not clear, Dr. Schneberger said, conservation officials from a number of states were afraid that if these fishermen should win their suit the whole licensing structure of sport fishing and hunting would collapse. Therefore, he recommended that the Council of State Governments make a study of the Great Lakes commercial fishing license fees charged non-resident fishermen. The commission formally concurred in the recommendation.⁷⁶

Another function of the Great Lakes Commercial Fishery Advisory Committee occasionally has been to obviate the necessity for a rule when the commission and the department feel that a rule is not the best solution to a problem. Regarding a dispute between commercial fishermen and sportsmen in the Sturgeon Bay region, a letter from the

⁷⁴ See: CONSERVATION COMMISSION MINUTES, Nov. 13, 1953, p. 11.

⁷⁵ Rule #F-405 (1939).

⁷⁶ CONSERVATION COMMISSION MINUTES, March 27, 1953, pp. 17-18.

assistant director to the governor, when Rule #F-405 (1939) was transmitted to the executive, stated:

"At our suggestion, representatives of the Great Lakes Fishery Advisory Committee met with representatives of the Cottage Owners' Association and the commercial fishermen operating in the area to discuss this problem fully, which they did and finally arrived at a gentlemen's agreement in regard to fishing in this area, thus making it unnecessary to include restrictive regulations in the present order."

Other agreements of this type have not always proved to be binding in the long run. At the November 1953 commission meeting, Dr. Schneberger of the department reviewed a request by the president of the Trollers Association that a rule be adopted setting aside an area for trolling only, near Washburn. Two years earlier, Dr. Schneberger explained, when this question was considered, the trollers and the commercial fishermen entered into a gentlemen's agreement regarding the use of this area. During the past summer, however, one or two commercial fishermen violated the agreement. Since that time, he pointed out, the gentlemen's agreement was reinacted and consequently it was not now necessary for the commission to take formal action on this matter. The commission agreed, and no formal rule was adopted.⁷⁷

Another activity in which the Great Lakes Advisory Committee occasionally engages is to recommend the adoption of legislation which it considers necessary. At its meeting of August 18, 1954, the committee adopted the following motion:

"The committee recommends that the Conservation Commission sponsor a bill in the 1955 legislature that will define the submarine trap net and provide a license fee comparable to the present pound net fee. Subsequent regulations would be by commission order after due study and public hearings are held. This recommendation to apply to Lake Michigan and Green Bay only."

After Dr. Schneberger noted that this recommendation was concurred in by the department, the commission expressed its formal approval and authorized the department to proceed with the preparation of the necessary bills.⁷⁸

Forestry Advisory Committee.⁷⁹ The Forestry Advisory Committee is still another of the commission's advisory groups. It does

⁷⁷ CONSERVATION COMMISSION MINUTES, Nov. 13, 1953, p. 13.

⁷⁸ CONSERVATION COMMISSION MINUTES, Oct. 7, 1954, p. 24.

⁷⁹ This committee was established in 1948. See: F. G. Wilson, *Restoring Wisconsin's Forests*, WISCONSIN CONSERVATION BULLETIN, June 1948, Vol. 13, pp. 10-15; N. LeMay, *Forest Protection Grows Up*, WISCONSIN CONSERVATION BULLETIN, June 1948, Vol. 13, pp. 19-24; I. Hassler, *The Forest Crop Law and its Use on Privately Owned Lands*, WISCONSIN CONSERVATION BULLETIN, Nov. 1954, Vol. 19, pp. 15-17; W. H. Brener, *Wisconsin's Forest Research*

not, however, appear to participate actively in the rule making process, either as an initiator or as a drafter of proposed rules. While its influence in this area is negligible, the Forestry Committee does exercise the important function of forestry policy review. It is here that its deliberation influences the commission in evaluating the effect of forestry policies which are incorporated into rules.

At the meeting of the commission on May 14, 1954, for example, Mr. Haukom, executive secretary of the Forestry Advisory Committee reviewed recommendations of the committee regarding watershed management and farm forestry. There simply was not enough forestry personnel, he complained, to handle even routine requests for their service. The advisory committee therefore recommended that 20 additional foresters be employed within the next two years. After Mr. Haukom had presented his views, commission chairman Rahr explained that after the commission had acted upon the budget, it would schedule a meeting devoted exclusively to the overall programs of watershed control and improvement. The discussion, however, took no action on the committee's recommendation urging employment of additional foresters.⁸⁰

The composition of this committee also has been roundly criticized recently by the Wisconsin Farmers Union at its annual convention in 1954. At the convention the following resolution was adopted:⁸¹

"WHEREAS, The Wisconsin Conservation Commission Forestry Advisory Committee is composed of too many big industry representatives, and

"WHEREAS, Most of Wisconsin's forests are owned by farmers and other small owners, and

"WHEREAS, The largest volume of timber is cut by small owners and farmer-loggers, and

"WHEREAS, The Forestry Advisory Committee is a public body and should represent a cross section of the people affected; now therefore be it

"RESOLVED, That the delegates attending the 24th annual Wisconsin Farmers Union Convention at Madison, Wisconsin . . . do hereby go on record requesting that the Wisconsin Conservation Commission re-appoint a Forestry Advisory Committee composed of 1 farmer, 1 small forest owner, 1 representative of the county forests, 1 small mill operator, and 1 representative from the big paper mills."

Conservation Director L. P. Voight called the commission's attention to this resolution at its meeting of December 10, 1954. He

Programs, WISCONSIN CONSERVATION BULLETIN, Jan. 1953, Vol. 18, pp. 17-22; *Minutes of the Forestry Advisory Committee*, WISCONSIN CONSERVATION DEPARTMENT.

⁸⁰ CONSERVATION COMMISSION MINUTES, May 14, 1954, p. 23.

⁸¹ ACTIVITIES PROGRESS REPORT, Dec. 1954, Appendix, p. 2.

explained that the department was not yet ready to make a recommendation on this problem. Commissioner Smith then informed the group that this matter had been discussed at a recent meeting of the Forest Industries Information Committee and it was then questioned whether this advisory committee was properly constituted. There was no provision for expiration of membership on the committee, Smith pointed out, and consequently the present membership would "continue indefinitely." Some action should be taken on this matter soon, he concluded. A tentative arrangement was made following this for a meeting of the commission and the committee to discuss this and other problems.

Other Advisory Groups. The Research Advisory Committee which was established in 1954 is one of the most recent advisory committees sanctioned by the Conservation Commission. This body resulted from the recommendations of a report on research made by a study committee under the direction of Commissioner Shorger. The report was made in September of 1953.⁸² The committee is composed of six members appointed by the commission for terms of six years. Four of the members are to be specialists in the fields of fish, game and forestry, while two members are to be selected from the area of the "general sciences." The recommendations of the Shorger committee seemingly gave the Research Advisory Committee authority to establish the priority of the department's research programs. However, when the department wrote up its recommendations for the commission as to the role of the committee this point was brushed over very lightly.⁸³ Indeed some representatives of the department feel that the Shorger committee's recommendations on this score were significantly weakened. The committee has not functioned long enough accurately to determine exactly what is its true role, and the minutes of its meetings indicate that a certain amount of confusion exists in the minds of its members on this point.⁸⁴

In addition to the formalized advisory committees just noted, there exists a series of boards which are primarily adjuncts of the department and in a broad sense might be considered advisory.⁸⁵ While their role in directly initiating rules appears slight, their counsel

⁸² Report of the Committee on the Research Activities of the Wisconsin Conservation Department, September 25, 1953.

⁸³ See for example: Admin. Memo, No. 36, July 14, 1954.

⁸⁴ See in particular: Joint Meeting of the Research Advisory Committees, Minutes, July 26, 1954, Wisconsin Conservation Department. For further discussions of the committee's role and functions see: ACTIVITIES PROGRESS REPORT, July 2, 1954, pp. 15-16.

⁸⁵ At least one writer, however, maintains that bodies of this nature can not accurately be labeled advisory committees. See: M. C. Tractett, *The Committee as an Instrument of Coordination in the New Deal*, 31 AM. POL. SCI. REV. 302 (1937).

and advice may play a part in crystalizing the thoughts of those normally responsible for initiating rules. There are 7 departmental boards—on forestry, fish, game, communications, clerical, public relations and law enforcement. There are also five area boards, one for each of the five conservation areas in the state. Finally, there is the personnel relation advisory board, which is primarily concerned with internal administrative problems within the department.

An additional body which may in the future develop into a significant initiator of conservation rules through its advisory role is the Wisconsin Natural Resources Committee.⁸⁶ As outlined in the statutes, the purpose of the committee is "to promote the welfare of the state of Wisconsin by providing a method of collecting, analyzing and interpreting information and of making recommendations to the several state agencies on matters relating to the soil, waters, forests, fish, wildlife, and other natural resources of the state . . ."⁸⁷ When the activities of this body were being discussed at a commission meeting in 1954, however, W. J. P. Aberg, who was addressing the commission emphasized that the "Natural Resources Committee is not an action agency but an advisory group."⁸⁸

The committee is composed of 2 representatives each from the Legislative Council, the Conservation Department, the University of Wisconsin, the Public Service Commission, the State Department of Agriculture, and one representative each from the State Planning Board, the Attorney General's Office, the State Soil Conservation Committee, the State Department of Taxation, and the State Highway Commission. A recent study of this body, however, indicates that its accomplishments to date have been rather limited, except for its issuance of some lengthy reports.⁸⁹ It has, however, in the last few years recommended various pieces of legislation.⁹⁰

MAKING THE PRELIMINARY DRAFTS OF RULES⁹¹

General Practices. Any interested party may, of course, make

⁸⁶ For a discussion of the goals and functions of the Natural Resources Committee see: John Wyngaard, *Under the Capitol Dome*, GREEN BAY PRESS GAZETTE, April 26, 1951; J. Wyngaard, *Under the Capitol Dome*, LA CROSSE TRIBUNE, May 15, 1951; *Natural Resources Committee Set Up Under New Law*, WISCONSIN CONSERVATION BULLETIN, Oct. 1951, Vol. 16, pp. 17-18; E. Swift, *Report to the People of Wisconsin on Progress in Conservation Education*, WISCONSIN CONSERVATION BULLETIN, Feb. 1952, Vol. 17; M. W. Torkelson, *The Natural Resources Committee of State Agencies*, WISCONSIN ACADEMY REVIEW, Vol. 1, pp. 5-6.

⁸⁷ WIS. STATS. (1953) §23.26(1).

⁸⁸ CONSERVATION COMMISSION MINUTES, June 10, 1954, p. 2.

⁸⁹ W. E. Scott, *Wisconsin's Natural Resources Committee*, (Unpublished Manuscript) Jan. 1955, pp. 12-22.

⁹⁰ See for example: ACTIVITIES PROGRESS REPORT, Nov. 1954, p. 3, for committee recommended legislation in 8 specific areas. See also: CONSERVATION COMMISSION MINUTES, May 14, 1954, p. 24.

⁹¹ For a discussion of this aspect of the rule making process in Wisconsin

a preliminary draft of a rule whether or not he is officially connected with a state agency. While practice varies, normally the original draft is prepared by personnel of the agency. This is usually a person who is most familiar with the subject matter dealt with in the proposed rule.⁹² The next step is that the rule, in almost all cases, is submitted to the drafter's administrative superior, who may be a division head or the administrative head of the agency, depending on the nature of the rule and the size of the agency. After this step has been taken, procedures differ in each agency. The chief may submit the rule to other staff members for their reactions and suggested alterations, or informal conferences may be conducted in which comments from those who are affected by or interested in the rule may be obtained. The draft may also be submitted to an advisory committee and to the Attorney General's Office. It is clear from this that the original drafting process, in the absence of specific legislation on the subject,⁹³ is usually informal.

Because of the informality surrounding the initial drafting process, the number of persons involved varies considerably depending on the size of the agency. In some large agencies like the Department of Public Welfare it may be a staff-wide process.⁹⁴ In smaller agencies, the drafting process is apt to be more personalized since the responsibility for the draft normally is left up to the head of the agency.⁹⁵

Conservation Commission Procedures. The two agencies in the state which have developed the most formalized process for drafting rule proposals are the Conservation Commission and the Public Service Commission.⁹⁶ The standard routine for drafting rules both in their preliminary form and in their final form was established for the Conservation Department by the conservation director's letter to the staff

see: WISCONSIN LEGISLATIVE COUNCIL, PRELIMINARY REPORT TO THE 1953 LEGISLATURE by the JOINT COMMITTEE ON ADMINISTRATIVE RULE MAKING, May 1953, pp. 15-20 and Appendix C; WISCONSIN LEGISLATIVE COUNCIL, INTERIM REPORT OF ADMINISTRATIVE RULE MAKING, August 1953, pp. 10, 29, 47, 66, 78, 87, 102; WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, Dec. 1954, pp. 34-38.

⁹² If the agency has an attorney on its staff, he usually is responsible for making the actual draft. See: WISCONSIN LEGISLATIVE COUNCIL, PRELIMINARY REPORT TO THE 1953 LEGISLATURE, May 1953, p. 16.

⁹³ The one possible exception might be Wis. STATS. (1953) §227.04. But as previously noted only a very few agencies have complied with its provisions.

⁹⁴ For a discussion of this process in the Department of Public Welfare see: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, Dec. 1954, pp. 34-35.

⁹⁵ For a discussion of how this process operates in a typical agency—the Department of Securities—see: *Ibid.*, p. 35-36.

⁹⁶ This was the conclusion of the staff of the LEGISLATIVE COUNCIL'S COMMITTEE ON ADMINISTRATIVE RULE MAKING. For a discussion of the process followed by the Public Survey Commission see: *Ibid.*, pp. 36-38.

on June 2, 1950. Since the major portion of the procedures established by this letter deal with the final rule, it will not be discussed in detail here. A brief discussion of procedures utilized in making the preliminary draft, however, is necessary at this time. The initial draft of a proposed rule is prepared by the Conservation Department's counsel in cooperation with those staff members who will be administratively affected by the rule after it is adopted. Extensive investigation and research by department technicians are frequently necessary before a rule proposal can be drafted.

The Conservation Commission and Department have an added problem in drafting one type of rule which does not confront many other state agencies. This relates to rules governing fish and game regulations on interstate boundary waters. When problems of this nature arise, Wisconsin authorities draft rules in conjunction with representatives of the conservation agencies in the other states affected.

For example, Dr. Schneberger discussed a rule establishing a reciprocal arrangement for fishing license on Minnesota-Wisconsin boundary waters at the September, 1953 meeting of the Conservation Commission.⁹⁷ He outlined objections of certain Wisconsin residents to this rule because they believed that several Wisconsin lakes in this area were unique and fishing there should be restricted only to Wisconsin residents or to individuals holding standard non-resident fishing licenses. The Wisconsin Conservation Department, Dr. Schneberger stated, recommended that this reciprocal agreement continue without excepting from its provisions those lakes in question. Mr. E. W. Palmer, representing the Wisconsin residents of the area, however, appeared and voiced his objections to the plan. Mr. O. W. Swenson of the Minnesota Conservation Department was present at this meeting and explained the views of the Minnesota department.

The Minnesota Conservation Department, Swenson said, was under considerable pressure to start closing some of Minnesota's lakes to Wisconsin residents if the Wisconsin practice of making exceptions to the reciprocal agreement continued. He also read to the commission a letter from the Minnesota director of the division of game and fishing urging the Wisconsin commission to continue to follow the spirit and the letter of the agreement. Following this presentation, the commission, with Commissioner Moreland dissenting, voted to accept the department's recommendation refusing to except from the provisions of the agreement the Wisconsin lakes at issue.⁹⁸

⁹⁷ CONSERVATION COMMISSION MINUTES, September 25, 1953, p. 6.

⁹⁸ For other rules affecting interstate boundary waters see: Rules #F-352 (1950); F-371 (1938); F-405 (1950); F-643 (1950); F-645 (1950); F-748 (1950).

SUMMARY

At least 21 statutory provisions confer rule making authority on the Conservation Commission. The primary sources for initiating conservation rules in Wisconsin are personnel of the department, private groups and the Conservation Congress in its capacity as an advisory committee to the commission. Other important sources of conservation rules are legislative action, national associations of conservation officials and the Great Lakes Fishery Advisory Committee.

The Conservation Commission, like almost all other state agencies, generally tends to favor informal procedures for the initiating of rule making. Although WIS. STATS. (1953) Section 227.04, required all agencies to prescribe formally by rule the procedure for submission of petitions for rule making, only two state agencies have complied with this requirement and the Conservation Commission is not one of them. The petition procedure for the Conservation Commission regarding fish and game season regulations, however, is spelled out in WIS. STATS. (1953) Section 29.174(3) and procedures regarding this area have been adopted by the commission. The newly REVISED ADMINISTRATIVE PROCEDURE ACT contains a provision specifically outlining the procedures to be followed for submission of petitions for rule making, although it will not affect Conservation Commission practices in this respect, since they are provided for specifically in other sections of the statutes.

A key problem today regarding the sources for initiating conservation rules concerns the relationship between the Conservation Congress and the Commission. Legally, the congress is an advisory committee to the commission. As such it has a peculiarly complex organization and function. The theory behind advisory committees composed of representatives of the public is that they serve a two-fold purpose. First they acquaint the policy formulators with the public sentiment on a given subject. Second, by working with the policy formulators, they are better able to understand the administrative problems confronting policy makers and will in turn be in a better position to acquaint the public with these practical problems, thus insuring better public relations for the agency.

The weakness inherent in advisory committees, some critics note, is that the members sometimes become so closely allied with the agency that they evolve into little more than spokesmen for the administrators. At the other extreme, such committees sometimes come to regard themselves as the primary policy formulators. In either case, the advisory committee fails to perform its proper function as a liaison agent between the public and the agency. Critics of the Conservation Congress have raised both of these charges against it.

During the last year, however, another problem has arisen concerning the basic relationship between the congress and the commission. While the legal role of the congress is only an advisory one, historically the commission has accepted a large percentage of its recommendations regarding fish and game seasons. This is probably traceable to the fact that the organization of the congress is such that it provides an especially comprehensive method of obtaining local sentiment on subjects which have been traditionally explosive in Wisconsin. During the last two years, however, the commission has shown a tendency to accept the recommendations of private individuals and small local groups over those of the congress. In 1955, the commission went so far as to reject a large portion of the congress' game recommendations, giving as an argument the fact that some local individuals and groups objected to the recommendations.

The public opposition to this action was such that the commission deemed it advisable to issue a joint statement of cooperation with representatives of the congress within a month following its action rejecting the recommendations of the congress.

It must be conceded that the role of the congress is and should be an advisory one only. However, it might be argued that because of the "grass roots" nature of its organization in all counties of the state, it would have a tendency to reflect the sentiments of the people of Wisconsin as a whole more adequately than would individuals or small local groups who have been especially effective in selling their point of view to the commission in the last two years. If this is not the case, there is little reason for the continued existence of the congress.